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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE INCORPORATED VILLAGE OF ROSLYN HARBOR, ROBERT LISLE, JOHN YOST, JOHN COLLINS, FRANK FAHNESTOCK and WILLIAM DENEERGAARD, constituting the Board of Trustees of the Incorporated Village of Roslyn Harbor,

Petitioner,

against

THE JEWISH RECONSTRUCTIONIST SYNAGOGUE OF THE NORTH SHORE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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& CLEARY, P.C.

May 14, 1976.

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The Incorporated Village of Roslyn Harbor, Robert Lisle, John Yost, John Collins, Frank Fahnestock and William deNeergaard, constituting the Board of Trustees of the Incorporated Village of Roslyn Harbor,

Petitioner,

against

The Jewish Reconstructionist Synagogue of the North Shore, Inc.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Opinions Below

1. In the New York State Court of Appeals three opinions were rendered, none of which commanded a majority of the Court. They are reported at 38 NY2d 283, 379 NYS2d 747, and are annexed hereto as Appendix 4.

The opinion of Judge Fuchsberg, concurred in by Judges Gabrielli and Cooke, appears at 38 NY2d 285, 379 NYS2d 750.

The concurring opinion of Chief Judge Breitel, concurred in by Judge Wachtler, appears at 38 NY2d 291, 379 NYS2d 756.

The dissenting opinion of Judge Jones, concurred in by Judge Jasen, appears at 38 NY2d 292, 379 NYS2d 757.

2. No opinion was rendered by the New York State Appellate Division, Second Department. A copy of its decision slip, published in 45 AD2d 988, 359 NYS2d 251 (Case 2), is attached as Appendix 5.

3. The memorandum decision of the New York State Supreme Court, Nassau County, (Meade, J.) dated July 12, 1973, was not reported; a copy is annexed hereto as Appendix 1.

Jurisdiction

1. The order of the New York State Court of Appeals sought to be reviewed was dated and entered in the office of the Clerk of the Court of Appeals on December 4, 1975 (Appendix 6).

2. Petitioner's motion for reargument or in the alternative, amendment of the remittitur, was denied by order of the New York State Court of Appeals dated March 30, 1976 (Appendix 7).

3. Jurisdiction of the United States Supreme Court to review the final order of the New York State Court of Appeals is conferred by 28 U.S.C. 1257(3) in that

(a) The validity of a state statute (local zoning ordinance) is drawn in question on the ground of its being repugnant to the Constitution of the United States (First Amendment); and

(b) Respondent synagogue has successfully and specially claimed under the Constitution of the United States (First Amendment) a right, privilege and immunity which exempts it from the otherwise generally applicable provisions of petitioner's zoning ordinance.

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Questions Presented

1. *General Question*: Are churches constitutionally entitled to special treatment under municipal zoning ordinances?

The Courts below answered "Yes".

2. *Specific Question*: Does a zoning ordinance provision establishing a non-variable minimum side yard of 100 feet for a church building infringe upon the religious freedom of respondent, which purchased an existing non-conforming dwelling with knowledge of the restriction and with intent to use the structure for its synagogue building?

The Courts below answered "Yes".

Statutory Authorities

1. Provisions from the U.S. Constitution.

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

2. Provisions from the Building Zone Ordinance of the Incorporated Village of Roslyn Harbor, Nassau County, New York.

The pertinent sections of the Roslyn Harbor Zoning Ordinance are Section 11-2.2, Section 11-2.14 and Section 11-2.30. The text of those sections is set forth in Appendix 8 attached hereto.

Statement of the Case: Facts

A. The Village and Its Zoning Ordinance.

Roslyn Harbor is a small, residential village improved primarily with expensive single-family residences on minimum one-acre plots. Incorporated in 1931, it has a 1970 population of 1,125 in an area of 630 acres, 94% of which is zoned for one-acre residential use (52).*

Its open, low-density character is further enhanced by the presence in the village of the Engineer's Club, a 150 acre golf club established in 1911 (52, 55), and a newly established Nassau County Park and Nature Preserve consisting of 140 acres (52). There is one church in the village which has been there since before 1900; its present building was erected in 1917 (54). There are approximately 250 homes built on approximately 305 available acres (53); the value of each ranges between $80,000 and $200,000 (54).

In contrast to its surrounding communities, Roslyn Harbor's population of 1,125 persons is small. For example, the 1970 populations of the immediately surrounding communities are as follows:

Glen Head	4,274
East Hills	8,656
Roslyn	11,208
Flower Hill	4,486

Similarly, the more remote communities which contribute most of respondent's congregation also have substantially larger populations:

Manhasset	8,541
Port Washington	22,040
Great Neck	28,720

* Unless otherwise indicated numbers in parentheses refer to pages in the Record on Appeal to the New York Court of Appeals.

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As pointed out by Village Clerk Halperin at the trial, the zoning practices and policies of the village over the years have been designed to preserve and protect the residential character of the village whose residents "have sought escape from a frenetic city atmosphere", and to preserve their mode of living and the investment in their homes in the village which they made "in the hope of finding seclusion and quiet" (7).

This Court's recent description of the Village of Belle Terre applies equally to Roslyn Harbor:

> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one * * *. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people." (*Village of Belle Terre* v. *Boraas*, 416 U.S. 1, at p. 9)

Similar objectives are sought by Roslyn Harbor's original zoning ordinance which was enacted in 1931 and amended in 1950 into substantially its present form (51). *Churches, schools and clubs are authorized by the ordinance in any zoning district* of the village as special exception uses (§ 11-2.14), provided that the Board of Appeals finds that they meet certain standards which are common to most zoning ordinances (§ 11-2.30). However, the Board of Trustees did provide, legislatively, that a building for a church, school or club use must be set back 100 feet from the side and rear property lines and 150 feet from the street (§ 11-2.14). It is this provision with respect to the side yard which presents the real issue in this case.

B. The Respondent.

Respondent Jewish Reconstructionist Synagogue of the North Shore, Inc., is a religious corporation with approximately 125 family members (7) having an average approximately of two children each (8) which arithmetically would produce a total membership of approximately 500.

Organized "about 7 or 8 years ago" (3), respondent presently conducts religious services on alternate Fridays and Saturdays, and maintains a youth program, religious education classes and various independent adult programs (3).

In the past respondent has used churches of other denominations located in Great Neck, Manhasset, Glen Cove and Searingtown (3, 7, 9). Of its 125 family members, apparently only four families, or less than 4%, live in the Village of Roslyn Harbor. Most of the remainder live in Great Neck (27 families), in Roslyn-Roslyn Heights-Roslyn Estates (55 families), and scattered in other areas on the North Shore of Long Island (27 families).

In late 1970 respondent purchased in the village two contiguous single-family residences "for the purpose of joining them into a single parcel" of 2.4 acres (58a-59a), on which to establish its synagogue facilities. It then applied to the village Zoning Board of Appeals for a permit to use the larger residence for conducting religious services, for operating a Hebrew School, and for conducting meetings of members of the synagogue, and to use the smaller residence as living quarters for the Rabbi or for the Director of the Hebrew School (59a).

C. The Subject Properties.

The two residential properties purchased by respondent were originally part of a single larger estate, the proposed synagogue building being a portion of the original estate house, and the proposed Rabbi's or the Director's dwelling

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being a former gate cottage. In 1954 an application to subdivide the 7½ acre estate into six single family residential plots was approved by the Planning Board, which noted that it was "for the best interest and general welfare of the village that said property should be broken up into *private residential estate type lots*" (emph. supp.) and further required removal of the wings of the "larger existing main dwelling" so that it would not be in violation of side yard requirements.

As a result of the subdivision, the former estate house was left as a smaller residential structure having a 29.7 foot side yard on its southeasterly corner (25). It is that building which is now sought to be used for religious services, the Hebrew School, and meetings of respondent's members. The present owners of the four other lots in this six lot subdivision strenuously objected at the hearing and intervened in the proceeding brought to review the Zoning Board's decision.

D. Application to Board of Appeals.

Notwithstanding the prior subdivision for residential purposes, and with knowledge that the existing structure did not meet the 100 foot side yard mandated by the ordinance for a church building, respondent nonetheless purchased the premises and then applied to the Board of Appeals for a special exception permit under § 11-2.14 so as to permit their use for synagogue purposes. In conjunction therewith, respondent sought certain variances, including a variance for the main building which did not meet the 100 foot side yard requirement.

At no time did respondent claim it suffered from any hardship; nor did it assert any inability to locate elsewhere in the village or in one of the larger surrounding communities where the bulk of its congregation resides.

Public hearings were held on three evenings, with expert witnesses called, and the four immediate neighbors all ap-

pearing by counsel. There was direct and cross-examination of witnesses, objections, motions and rulings in much the same manner as a court trial.

After memoranda were submitted by counsel, the Board of Appeals finally held that it lacked the power to vary the 100 foot side yard requirement. Since that requested variance was essential to respondent's application which hinged upon use of the existing building, only 29.7 feet from the property line, for synagogue purposes, the Board denied the application (108a-118a). Respondent instituted a review proceeding which ultimately confirmed the Board's interpretation that it could not vary the ordinance's 100 foot side yard requirement (*Jewish Reconstructionist Society* v. *Levitan;* decision of Meade, J. dated January 14, 1972, N.O.R.; affirmed with two justices dissenting, 41 AD 2d 537, 339 NYS 2d 274; affirmed unanimously with a memorandum, 34 NY 2d 827, 359 NYS 2d 55).

Thus, in that earlier litigation the zoning ordinance was judicially construed to include a non-variable requirement throughout the village that any building to be used for church, school, or club purposes must be situated at least 100 feet from its property line.

E. Constitutional Issues Raised and Disposed of.

1. *In the Trial Court.* Respondent brought a declaratory judgment action claiming that the non-variable side yard requirement and the village's failure to grant it a use permit for synagogue purposes, notwithstanding the 29 foot actual side yard, infringed its constitutional rights. In paragraph 2 of its complaint, respondent alleged that the restrictions of the ordinance, including the 100 foot side yard requirement, "as applied to churches, schools and synagogues in general, and as applied to the Temple Property and plaintiff's application to use the same as aforesaid, are unconstitutional, illegal, invalid and void" (44a-52a).

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In substance respondent alleged that simply because respondent was a religious organization the village had no right to apply to its property the usual zoning considerations of "health, safety, morals, convenience and general welfare" (44a-45a), "harmony with the general purpose and intent of the zoning ordinance" (45a-46a), conformity to "the comprehensive plan and design as set forth in the zoning ordinance" (46a), possible depreciation of property values (46a-47a), possible alteration of the essential character of the neighborhood (47a), detrimental effect on public convenience and welfare (48a), feasibility of the use in a less restricted district (48a), accessibility for fire and police protection, access of light and air, and hazards from fire (49a), traffic problems and transportation requirements and facilities (49a-50a), or reports from the Bureau of Fire Prevention as to fire hazards and from the Chief of Police as to traffic (50a-51a).

In its "WHEREFORE" clause, respondent demanded judgment declaring that the pertinent sections of the ordinance "as applied to churches, schools and synagogues with particular reference to [respondent's] property, as aforesaid, are void, illegal, unconstitutional and invalid." (53a)

In the court of first instance, Justice Meade addressed himself directly to the constitutionality of the village's zoning ordinance restrictions when applied to churches and synagogues. After reviewing the facts (7a-14a), he turned to respondent's constitutional attack on the zoning ordinance (14a-15a), noting that respondent "predicates its arguments upon the fact that it is a religious body and as such enjoys a most favored posititon" (15a), and quoting from *Matter of Westchester Reform Temple* v. *Brown*, 22 NY2d 488, at p. 496:

> "Religious structures enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of police powers, but the power of regulation has not been altogether obliterated."

Then, after reviewing the village's position (16a-17a), the trial court concluded that the ordinance in question is unconstitutional, stating:

> "The presumption of legality applying to the legislative enactment of defendant trustees as well as the factors urged by them as motivating the non-variable restrictions imposed in the ordinance are *outweighed by the constitutional protection afforded a religious organization* such as the plaintiff (*Matter of Westchester Reform Temple* v. *Brown, supra,* at p. 496).
>
> The fact that the plaintiff's members are in the main non-residents of the Village does not justify the application of more restrictive standards than those affecting residents. *It is the character of the plaintiff as a religious body that controls* and not the places of residence of its members. Neither are the other facts advanced by defendants as reasons supporting its enactment of such consequence as to constitute a circumstance justifying denial of plaintiff's right to locate in the district of its choice. Finally, the non-variable side-yard requirement of 100 feet is not reasonable when applied here.
>
> It is the opinion of this Court that *the existing ordinance of the defendants, as it applies to the plaintiff, is an unconstitutional enactment.*" (18a-19a; emph. supp.)

In its judgment, the Nassau County Supreme Court simply declared the offending sections of the ordinance "unconstitutional insofar as they prevent the Village Board of Appeals from granting to plaintiff a permit to use and occupy [the land and existing building] for synagogue purposes." (6a).

2. *In the Appellate Division.* The Appellate Division, Second Department, simply affirmed without opinion (135a).

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3. *In the New York Court of Appeals.* The three opinions in the Court of Appeals (Appendix 5, attached) focused squarely on the central constitutional issue: the extent to which churches are subject to zoning restrictions. The prevailing opinion, in effect, held that the village's ordinance was constitutionally invalid because it required a minimum of 100 feet between a church building and neighboring properties. Although he acknowledged the "growing support for the view that churches ought to be subject to the same zoning considerations which are permitted to govern applications from other entities" (38 NY2d at p. 287), Judge Fuchsberg in his prevailing opinion held the village's 100 foot side yard requirement invalid because "the peculiarly pre-eminent status of religious institutions under the First Amendment provision for free exercise of religion remains an important factor entering into the balance that also weighs the needs of desires of the community." (38 NY2d at p. 288).

Following prior case law in New York, Judge Fuchsberg held that the right to free exercise of religion as manifested in the erection or use of a structure, must in the case of an irreconcilable conflict override the public interests in promoting health, safety and welfare. The core of his opinion is found in the following quotation from *Matter of Westchester Reform Temple* v. *Brown,* 22 NY2d 488, at pp. 496-497:

> "We have not said that considerations of the surrounding area and potential traffic hazards are unrelated to the public health, safety or welfare when religious structures are involved. We have simply said that they are outweighed by the constitutional prohibition against the abridgment of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community. If the community can, consistent with this policy, both comply with the constitutional require-

ment and, at the same time, avoid or minimize, insofar as practicable, traffic hazards or other potential detriments bearing a substantial relation to the health, safety and welfare of the community, there is no barrier to its doing so. Nevertheless, we have already decided in the *Rochester* case that, *where an irreconcilable conflict exists between the right to erect a religious structure and the potential hazards of traffic or diminution in value, the latter must yield to the former.*" (emph. supp.)

Judge Jones dissented (with Judge Jasen concurring) in an opinion which crystallizes the constitutional issues posed by this case. His penultimate paragraph concisely states the issue and his view of a proper disposition:

> "Given the reasonable expectation that use of the premises on Glenwood Road for synagogue purposes will surely increase vehicular traffic in the area and create parking problems, not only endangering the comfort and convenience of residents of the community but also creating hazards to public health and safety, we cannot conclude that there are constitutional or other legal considerations which preclude the application of what to us are the reasonable provisions of this zoning ordinance to this property owner in the circumstances presented in this record. Rather we would conclude that there is a reasonable relationship between the zoning regulation as sought to be applied here and the public health, safety and general welfare of the Village of Roslyn Harbor, and that the application of such regulation would not infringe the legitimate interests of respondent synagogue. *The time has come when our court should forthrightly face the legal, economic and social implications of continued slavish adherence to the outmoded doctrine that churches and synagogues are wholly immune from even reasonable zoning regulation.*" (38 NY2d at p. 295; emph. supp.)

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Chief Judge Breitel, with Judge Wachtler agreeing, concurred in the result, though not the reasoning of Judge Fuchsberg's prevailing opinion. Chief Judge Breitel agreed with Judge Jones on the principle involved, stating that

> "The law should move in the direction of requiring even religious insitutions to accommodate to factors directly relevant to public health, safety or welfare, inclusive of fire and similar emergency risks, and traffic conditions insofar as they involve public safety. 38 NY2d at pp. 291-2 [citations]. * * * It is the all but conclusive presumption that considerations of public health, safety and welfare are always outweighed as some of the precedents suggest, by the policy favoring religious structures that I find objectionable. Hence, my rejection of the absolute view expressed in the majority opinion * * *." (38 NY2d at pp. 291-2).

Nevertheless, Chief Judge Breitel voted to affirm because

> "It is likely that the effect, if not the purpose of the ordinance is exclusionary, without compensating values to sustain a public purpose related to public safety and public welfare. The overall impact of the restrictions in the ordinance as it now reads does not accommodate sufficiently to the priorities, albeit it limited, that should be accorded to religious institutions." (38 NY2d at p. 292).

With these divided views, the Court of Appeals affirmed (Appendix 6).

Argument

Certiorari should be granted because this case turns on an issue of religious freedom which:

(1) arises under the First Amendment;

(2) affects nearly every state and locality in the nation;

(3) has never been passed upon by the Supreme Court;

(4) is the subject of conflicting decisions in the states; and

(5) involves an area of law (zoning) which is increasingly and properly being subjected to Supreme Court scrutiny.

We shall discuss each of these points separately.

1. The Issue Arises Under the First Amendment

Respondent has claimed, and the courts below have held, that special leniency, if not complete immunity, must be granted to all churches, simply because of the freedom of religion guarantee of the First Amendment.

2. The Issue Affects Nearly Every State and Locality in the Nation.

Zoning ordinances, like churches, are found in every part of the nation. As a result, nearly all communities today have zoning ordinances, many of them with special restrictions and regulations affecting church use of land and buildings. Guidelines are therefore appropriate for a proper balance between the constitutional rights of religious institutions and the community's need for reasonable land use and safety regulation under the police power.

3. The Issue Has Never Been Passed Upon by the Supreme Court.

None of the few prior decisions of the Supreme Court on zoning have involved churches or religious freedom. In *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, this Court in 1926 upheld the general concept of zoning as a proper exercise of the police power. Two years later, in *Seattle*

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Trust Co. v. *Roberge,* 278 U.S. 116, an ordinance requiring consent to a regulation by the surrounding property owners was stricken as a denial of due process.

In two cases the Supreme Court declined to review lower court zoning decisions which involved churches. One of them upheld a zoning ordinance which excluded churches from a residential zone (*Corporation of Presiding Bishop of Church of Latter-Day Saints* v. *City of Porterville,* 90 Cal. App. 2d 956, 203 P2d 823, App. dsmd. 338 U.S. 805). The other sustained the denial to a church of a special use permit in a business zone (*St. James Temple of A.O.H. Church of God* v. *Board of Appeals,* 100 Ill. App. 2d 302, 241 NE2d 525, cert.den. 395 U.S. 946).

In both cases churches had been denied permission to operate because of zoning restrictions, and this Court did not interfere, notwithstanding the claims of restraint on religious freedom. Those decisions, however, run counter to the New York decision below, which all but exempts churches from zoning controls.

Not until 1974 in *Belle Terre* v. *Boraas,* 416 U.S. 1, did this Court take up another zoning case. But neither that case, nor the few decisions since, nor *Gribbs* v. *American Mini Theaters, Inc.* (cert. granted October 20, 1975; argued March 24, 1976), nor *City of New Orleans* v. *Dukes* (probable jurisdiction noted April 14, 1975; argued November 11, 1975), involved churches or freedom of religion concepts.

The impact of zoning on churches, therefore, is a novel question for this Court.

4. The Issue Is the Subject of Conflicting Decisions in the States.

Some state courts permit zoning ordinances to regulate churches in the same manner as other properties. Others, as in New York, view the First Amendment as requiring

of a municipality a virtually "hands off" zoning policy for churches. This conflict in view has been the subject of comment by text writers.

Professor Anderson in his "American Law of Zoning" (1968 Edition) points out that

> "a church or other place of worship has characteristics which present problems that are the legitimate concern of zoning regulation. A church generates traffic and creates a parking problem. *This can injure a residential neighborhood.* A religious use, being nontaxable, results in a shift of the tax burden to other land in the community or area. If religious use is broadly defined, it may include schools and recreational facilities which produce traffic, noise, and litter *injurious to a residential district.* Thus, religious uses present a complex zoning problem. They contribute to the public welfare, but *they are potentially a disturbing factor in a residential neighborhood.* They enjoy some immunity from regulation but they are not totally beyond the reach of municipal zoning power. The rules represent a judicial attempt to accommodate the benefits of religious use to the requirements of effective land-use control." (Emph. supp.; Anderson, § 9.19, p. 147)

Anderson also notes:

> "Because religious uses are capable of endangering not only the comfort and convenience of the community, but also of creating hazards to public health and safety, it is highly important that the dimensions of such use be clearly established." (Anderson, § 9.25, p. 162)

Similarly, the new edition of "The Law of Zoning and Planning" by Arden H. Rathkopf also raises questions about churches in residential areas. He points out that while the majority view prohibits exclusion of churches

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from residential areas, there is a minority view

> "that churches are subject to zoning ordinances in the same manner and to the same extent as other uses, and that if the inclusion of churches in residential districts does not fit the comprehensive plan established by the ordinance, they may validly be prohibited therein as other uses legislatively found incompatible are excluded therefrom." (Rathkopf, pp. 19-4 and 19-5).

As authority, Rathkopf cites cases from California, Connecticut and Oregon. Florida also permits exclusion of churches (See Anderson, § 9.19, pp. 152-3). Commenting upon this minority point of view, Rathkopf states:

> "There is something to be said for the minority point of view. The traditional concept of a small church serving the immediately neighboring community undoubtedly had something to do with the idea that such use was an integral part of community life in 'the best and most open localities.' However, the establishment of a modern church, not dependent upon local residents as its communicants, and in some instances attracting people from far distances, the inevitable use of the automobile in connection therewith and the increased activities of the church for social and community functions having only a remote connection with its primary function, all present a different picture.
>
> Modern land uses customarily set aside in the very type community in which the question is most often raised, highclassed residential areas on large minimum plots. These have been upheld principally on the ground that such large plots and single family residences thereon are in furtherance of the purposes of the police power which justifies zoning. The courts have pointed out that there is nothing which prevents zoning a community entirely residential. They have pointed out that there are sociological gains in providing exclusive districts as long as less restricted dis-

tricts also exist. While the impact of a traditional small place for worship upon such an area would be de minimus if it existed at all, the impact of a modern church with its parking lot, assembly rooms and week-long activities is entirely different." (Rathkopf, p. 19-8)

See also Note: "Churches and Zoning", 78 Harvard Law Review 1428 (1957).

5. The Issue Involves an Area of Law (Zoning) Which Is Increasingly and Properly Being Subjected to Supreme Court Scrutiny.

As indicated above, in the 1920's the Supreme Court wrote two opinions on the validity of local zoning ordinances. Nearly 50 years passed, however, before the Court again addressed itself to the constitutional merits of a local zoning ordinance. Since the *Belle Terre* decision in 1974, however, the Court has clearly recognized the need for national constitutional standards in the zoning field, and has reviewed at least three other cases which presented significant questions in this exploding field of law. While the proper relationship between church and state has been the subject of many other decisions by the Supreme Court, none yet has addressed itself to the fundamental questions raised when a municipality seeks by zoning to regulate its churches. This is such a case; its issue is clearly presented; it calls for decision now.

Summary and Conclusion

This case presents a confrontation between First Amendment religious freedom and the police power of a municipality to regulate land use through its zoning ordinance. The specific regulation in question is a non-variable 100 foot side yard requirement for a church building. Without such a yard, the Village Board of Appeals was pro-

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hibited by the ordinance from granting respondent the special exception permit it needed for its proposed synagogue operation.

We have, then, on one hand a legislative prohibition of this church's use, grounded in a public policy which is rationally related to the Village's objectives of maintaining a residential community of quiet seclusion, as free as possible from congestion, traffic, air pollution and noise. On the other hand, we have a synagogue insisting that its religious freedom under the First Amendment overrides the Village's requirement for a 100 foot side yard, and, indeed, supersedes all restrictions in the applicable ordinance.

Below, the New York State Court of Appeals split three ways over the issue, with all judges recognizing at least a "growing support for the view that churches ought to be subject to the same zoning considerations which are permitted to govern applications from other entities." (38 NY2d at p. 287).

The stage is set, therefore, for the Supreme Court to settle these conflicting views and determine to what extent the First Amendment prevents municipal imposition on churches of zoning requirements which are compatible with the permissible and rationally implemented policies of a community.

A writ of certiorari should issue to review the order and opinion of the New York Court of Appeals.

Respectfully submitted,

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Dated: May 14, 1976.

State Court Judgments and Opinions.

Appended hereto are the following judgments, orders and opinions rendered in the New York State courts below:

Appendix 1—Memorandum Decision of Nassau County Supreme Court, dated July 12, 1973 (Meade, J.).

Appendix 2—Judgment of Nassau County Supreme Court granted and entered September 10, 1973, declaring zoning ordinance invalid.

Appendix 3—Order of Appellate Division, Second Department, dated September 6, 1974, affirming without opinion the judgment of the Nassau County Supreme Court.

Appendix 4—Decision slip of Appellate Division, Second Department, dated September 6, 1974.

Appendix 5—Prevailing, concurring and dissenting opinions of New York State Court of Appeals, dated December 4, 1975.

Appendix 6—Order of New York State Court of Appeals dated December 4, 1975, affirming order of Appellate Division, Second Department.

Appendix 7—Order of New York State Court of Appeals dated March 30, 1976, denying Village's motion for reargument or in the alternative amendment of the remittitur.

Appendix 8—Sections 11-2.2, 11-21.14, and 11-2.30 of the Building Zone Ordinance of the Incorporated Village of Roslyn Harbor, Nassau County, New York.

BLEED THROUGH

Appendix 1, Memorandum Decision of Nassau County Supreme Court, dated July 12, 1973 (Meade, J.).

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

JEWISH RECONSTRUCTIONIST SYNAGOGUE OF THE NORTH SHORE, INC.,

Plaintiff,

against

THE INCORPORATED VILLAGE OF ROSLYN HARBOR and ROBERT LISLE, JOHN YOST, JOHN COLLINS, FRANK FAHNESTOCK and WILLIAM DENEERGAARD, constituting the Board of Trustees of the Incorporated Village of Roslyn Harbor,

Defendants.

Dated: July 12, 1973
Index No. 2626/72
Cal. No. S-5384

SCHIFFMACHER, CULLEN, ROCHFORD & FARRELL, Esqs.,
Attorneys for Plaintiff
98 Cutter Mill Road
Great Neck, New York 11021

PRATT, CAEMMERER & CLEARY
Professional Corporation
Attorneys for Defendant
195 Willis Avenue
Mineola, New York 11501

Plaintiff seeks a judgment declaring certain provisions of defendants' Zoning Ordinance unconstitutional as ap-

Appendix 1, Memorandum Decision of Nassau County Supreme Court, dated July 12, 1973 (Meade, J.).

plied to churches, schools and synagogues, determining the rights of the parties and directing the defendants' Board of Appeals to issue a permit.

Plaintiff, a religious corporation. owns about 2½ acres in a Residence A District of the Village. On its property is a residence set back 275 feet from the street, 29.7 feet from one sideline, 100 feet from the other sideline and 200 feet from the rear line. Also on the property is a guest house, set back 22.8 feet from the street. Wishing to convert the main residence to a synagogue and Hebrew school, and to use the guest house as a residence for the school's director, plaintiff applied to the Board of Appeals for a special exception to use the property for those purposes, and for variances from (a) the requirement of a 100-foot setback from the sidelines, (b) a provision barring an accessory building in the front yard and (c) the provision in section 11-2.30 which prohibits a special exception unless the structures conform to the height, area and side yard requirements of the Zoning Ordinance. The board denied the application on the ground that it lacked power to grant the requested special exception and variances because the buildings did not meet the initial requirement of a 100-foot setback; and it further held that if it had the power to grant the requested relief it would still deny the application on the merits. Plaintiff then instituted a proceeding pursuant to Article 78 of the Civil Practice Law and Rules to annul the board's determination. Without answering the petition, the board moved to dismiss the proceeding on the ground that it lacked the power to grant the requested relief. Special Term granted the motion to dismiss on that ground and the Appellate Division affirmed by a divided court (*Matter of Jewish Reconstructionist Synagogue of the North Shore, Inc.* v. *David M. Levitan, et al.*, 41 A D 2d 537). The plaintiff then instituted this action.

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Appendix 1, Memorandum Decision of Nassau County Supreme Court, dated July 12, 1973 (Meade, J.).

The provisions of the defendants' Zoning Ordinance relating to the powers of its Board of Appeals and under attack in this action are as follows:

"Section 11-2.14

"Permit in any district churches, public and parochial primary and secondary schools and clubs not operated for a profit. Every application to the Board of Appeals shall be accompanied by a plan showing the location of the intended building and structures to be erected upon the property affected. The Board of Appeals shall require that the applicant provide an off street parking area of such size as in the judgment of the Board of Appeals shall be adequate for the number of persons who may be accommodated in such building. *No such building shall* be erected or *be used* for such purposes within one hundred and fifty (150) feet of any street line nor within *one hundred (100) feet of any property line.*"

"Section 11-2.30

"On all applications for permits under Sections 11-2.2 and following sections, the Board of Appeals in addition to the requirements hereinabove set forth shall give consideration to the health, safety, morals, convenience and general welfare of the village and of its property owners and residents and shall act in harmony with the general purpose and intent of this ordinance and the applicable provisions of the Village Law.

"The determination of the Board of Appeals on all applications under Sections 11-2.2 and following shall be made in accordance with the comprehensive plan and design set forth in this ordinance and the purpose and intent set forth in the title, sub-title and the preamble thereto and in Section 177 of the Village Law.

Appendix 1, Memorandum Decision of Nassau County Supreme Court, dated July 12, 1973 (Meade, J.).

The Board shall not authorize the issuance of any permit under any of the provisions of Sections 11-2.2 and following, *unless it finds* in each case *that the proposed use* of the property or the erection, alteration or maintenance of the proposed building or structure:

"a. Will not depreciate or tend to depreciate the value of property in the village.

"b. Will not create a hazard to health, safety, morals and general welfare, and will not be detrimental to the neighborhood or the residents thereof.

"c. Will not alter the essential character of the neighborhood.

"d. Will not otherwise be detrimental to public convenience and welfare.

"Before authorizing the issuance of any permit under Sections 11-2.3, 11-2.4 and 11-2.14 said Board, *in addition* to the foregoing findings, *shall find that the proposed use* or the erection, alteration and maintenance of the proposed building and structure *will not be feasible or practicable in a less restricted district.* Said Board shall also give consideration to the following: Accessibility of the premises for fire and police protection; access of light and air to the premises and adjoining property, traffic problems, transportation requirements and facilities, hazards from fire, the size, type and kind of buildings and structures in the vicinity where the public is apt to gather in numbers; and before authorizing the issuance of any permit for such proposed use or the erection of the proposed building and structure the Board may require the applicant to submit reports from the following: The Bureau of Fire Prevention, if any, as to fire hazards, if any; the Chief of Police as to the traffic hazards,

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Appendix 1, Memorandum Decision of Nassau County Supreme Court, dated July 12, 1973 (Meade, J.).

if any; and the administrative officials as to the type and design of the proposed buildings and structures.

"All of the buildings and structures for which permits are authorized to be granted by the Board under Sections 11-2.2 and following *shall,* except as otherwise specifically provided in said sections, *be in accordance with height, area and yard requirements prescribed in this ordinance* and all such buildings and structures shall conform with all applicable laws and regulations relative to their construction, location, operation and maintenance." (Emphasis supplied.)

At the trial plaintiff offered evidence as to the proposed synagogue and related school use of the building at its existing location and elicited from its expert planning witness the opinion that the setback of 29.7 feet from a side line, rather than the ordained 100-foot setback, would have no adverse effect upon adjacent properties or upon the safety, health and general welfare of the community. In support of this opinion, particularly as to the possibility of noise and congestion emanating from a a synagogue use, this expert pointed to the juxtaposition of adjacent residences and the plaintiff's proposed synagogue building, the topography of the area, the existence of trees and shrubs together wth the type of construction of the main building at the site. Upon cross-examination this witness conceded that good planning and zoning practice dictates different treatment be given places of public assembly than treatment be given places of public assembly than that applying to single-family residences; that the more intense the public assembly use, the less compatibility there is with a single-family residential use, but that the incompatibility would be determined in great measure by topography, juxtaposition of buildings, trees and shrubbery together with the type of the building's construction.

Appendix 1, Memorandum Decision of Nassau County Supreme Court, dated July 12, 1973 (Meade, J.).

The plaintiff, through a building expert, at trial demonstrated to the satisfaction of this Court that the building proposed for the synagogue use could not be physically moved to conform with the ordained setback requirements except at a substantial cost and that the better part of wisdom would dictate construction of a new building rather than attempt to move the existing one.

The evidence offered at trial by defendants demonstrated that the village has a population of 1,125, a total area of 630 acres with 94% zoned for one-acre residential use. The value of the existing residential homes ranges from $80,000 to $200,000. Further, the policy of the defendants for many years has been to maintain an expensive single-family residential use with attendant quiet and seclusion. From the evidence adduced both parties agree that of the present membership of plaintiff which consists of 150 families (between 300 and 350 people) less than 4% live in defendant village, the remaining members residing in larger and more heavily populated neighboring communities. Finally, defendants demonstrated at the trial that the subject parcel had been part of a larger holding of six acres that was with the approval of defendants' Planning Board in 1954 subdivided into six residential plots, two of which constitute the subject in this action.

It is a fact that the side-yard requirement of the defendants' ordinance for a residential use of the subject building is 25 feet.

In urging unconstitutionality of the ordinance, the plaintiff maintains the following:

That the provision which abridges the power of the Board of Appeals to grant a variance of the setback requirement is beyond the power of a village ordinance (*Matter of Bobandal Realties, Inc.* v. *Carroll M. Worthington,* 21 A D 2d 784; *Matter of Waldorf* v. *Coffey,* 5 Misc 2d 80);

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Appendix 1, Memorandum Decision of Nassau County Supreme Court, dated July 12, 1973 (Meade, J.).

That those provisions (Sec. 11-2.30) which require as a prerequisite to the granting of the special exception sought here that the Board of Appeals make the following findings are contrary to law, in each instance:

(a) Will not depreciate or tend to depreciate the value of property in the village. (*Matter of Diocese of Rochester* v. *Planning Board,* 1 N Y 2d 508).

(b) Will not create a hazard to health, safety, morals and general welfare, and will not be detrimental to the neighborhood or to the residents thereof.

(c) Will not alter the essential character of the neighborhood.

(d) Will not otherwise be detrimental to public convenience and welfare. (*Matter of Westchester Reform Temple* v. *Brown,* 22 N Y 2d 488.)

(e) The proposed use will not be feasible or practicable in a less restricted district. (*Matter of Community Synagogue* v. *Bates,* 1 N Y 2d 445, at page 458.)

Plaintiff of course predicates its arguments upon the fact that it is a religious body and as such enjoys a most favored position. In *Matter of Westchester Reform Temple* v. *Brown, supra,* the court describes the position of plaintiff and its strength when it says at p. 496:

> "Religious structures enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of police powers, but the power of regulation has not been altogether obliterated."

Defendants assert that the ordinance as a legislative enactment enjoys a presumption of validity that plaintiff

has failed to overcome. The ordinance, it is maintained, does not exclude churches from any district but merely regulates them. The prerequisite findings to be made by the Board of Appeals are characterized by defendants as normal zoning requirements, appropriate to the use sought. Defendants further maintain that the setback requirement of 100 feet is a reasonable one for its legislators to mandate in the light of its long-established low-density residential character and in view of the charge of Section 177, Village Law, that reasonable consideration shall be given to the character of a zoned district. Defendants distinguish the instant case from both *Matter of Diocese of Rochester* v. *Planning Board, supra,* and *Matter of Westchester Reform Temple* v. *Brown, supra,* factually since plaintiff here is not a community body but rather is one whose needs would be better served at a site more centrally located for the great majority of its membership; since plaintiff is not presently established in the community; since plaintiff purchased the subject parcel with knowledge of the requirements of the ordinance then in existence for many years; since plaintiff will not be confronted with other than the inconvenience of selecting another site.

In essence, the defendants contend that its ordinance is a proper exercise of power within the contemplation of that language employed in *Matter of Diocese of Rochester* v. *Planning Board, supra,* where it said at p. 526:

> "That is not to say that appropriate restrictions may never be imposed with respect to a church and school and accessory uses, nor is to say that under no circumstances may they ever be excluded from designated areas."

Whatever may be the circumstances that would justify the exclusion of a church use from a designated area, the

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plaintiff has demonstrated to the satisfaction of this Court that such circumstances are not present in this instance. Appropriate here is the language employed in *Brandeis School* v. *Village of Lawrence*, 84 N.Y.S. 2d 687, at p. 696:

> "In view of the fact that the court held that a church or parochial school could not be barred from a residential district because traffic hazards would be increased; or because the enjoyment of neighboring property would be lessened; or because locating a church or school in the area would adversely affect property values, it is hard to bring to mind what 'circumstances' could exist in a given situation which would justify denying a church or school the right to locate in a particular residential district."

The presumption of legality applying to the legislative enactment of defendant trustees as well as the factors urged by them as motivating the non-variable restrictions imposed in the ordinance are outweighed by the constitutional protection afforded a religious organization such as the plaintiff (*Matter of Westchester Reform Temple* v. *Brown, supra,* at p. 496).

The fact that the plaintiff's members are in the main non-residents of the Village does not justify the application of more restrictive standards than those affecting residents. It is the character of the plaintiff as a religious body that controls and not the places of residence of its members. Neither are the other facts advanced by defendants as reasons supporting its enactment of such consequence as to constitute a circumstance justifying denial of plaintiff's right to locate in the district of its choice. Finally, the non-variable side-yard requirement of 100 feet is not reasonable when applied here.

It is the opinion of this Court that the existing ordinance of the defendants, as it applies to the plaintiff, is an un-

constitutional enactment. Those provisions, discussed earlier, which mandate positive findings by the Board of Appeals before a permit may be granted have been tested and rejected in a number of cases, particularly in *Matter of Diocese of Rochester* v. *Planning Board, supra; Matter of Westchester Reform* v. *Brown, supra; Matter of Community Synagogue* v. *Bates, supra.* Further, a Board of Appeals may not be deprived by a local ordinance of the powers granted to it by Section 179-b, Village Law (*Matter of Bobandal Realties, Inc.* v. *Carroll M. Worthington, supra*). Here the ordinance does so deprive its Board of Appeals since it cannot vary the height, area and yard requirements and hence must be stricken as invalid. Further, the uncontradicted testimony of plaintiff's zoning expert as to the physical characteristics of the site in question demonstrates the wisdom of entrusting to an appeal board the power and the responsibility of adjusting preordained requirements to the practical needs of an applicant, particularly one enjoying the favored status of the plaintiff.

Those considerations which are incorporated in the ordinance and made prerequisite findings are of such a nature as to warrant their inclusion in the deliberative processes of that board charged with the responsibility of granting special exception permits. Similarly, the issuing board properly includes in its deliberations those other features spelled out in Sec. 11-2.30 for its consideration, i.e., access of light and air, hazards from fire, etc. While such matters may not constitute the basis for the exclusion, directly or indirectly, of a church with accessory school use, as is attempted here, they nevertheless provide a background against which conditions for the use may be fashioned. This kind of ordinance would then provide that flexibility which was approved in *Matter of Westchester Reform Temple* v. *Brown, supra,* in its treatment of the

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Griffin case at p. 495. If unreasonable conditions are fashioned under such an ordinance, then relief is available by way of review pursuant to Article 78, Civil Practice Law and Rules.

The decision of the Board of Appeals of defendant Village was introduced into evidence at the trial. It is noted therein that the plaintiff had agreed in advance to comply with all requirements of the Building Code, County Health Department, Fire Marshal's office and the Board of Appeals' requirements with respect to structural requirements, fire safety, drainage, health and sanitary regulations, noise limitations, lighting restrictions, fencing, screening and landscaping. This willingness to comply is, in the opinion of this Court, comprehensive enough to permit the imposition of those conditions which can be fashioned to minimize the impact of the use contemplated by this plaintiff.

The Board of Appeals declared that were it to exercise a power to vary the ordinance, it would be negative since it found (1) the main building unreasonably close to neighboring properties, (2) lack of adequate water supply for fire protection, and (3) creation of a traffic hazard at the entrance. Finally, the Board stated that in view of its determination that it would deny the application it had not worked out detailed requirements as to parking, lighting, drainage, etc., most of which, it asserted, would require study and recommendations of the Planning Board.

In view of the determinations made here affecting the constitutionality of the ordinance and in view of the time and effort that has been expended by the plaintiff and the Board of Appeals, the defendants should direct that Board to undertake at the earliest practicable date those steps necessary to establish the detailed requirements, standards and conditions to be applied to plaintiff's use.

Appendix 1, Memorandum Decision of Nassau County Supreme Court, dated July 12, 1973 (Meade, J.).

This action was tried before the Court without a jury and no special findings were requested. The foregoing constitutes the decision of the Court pursuant to CPLR 4213.

Submit judgment on notice.

s/ ROBERT C. MEADE
J. S. C.

BLEED THROUGH

Appendix 2, Judgment of Nassau County Supreme Court, Granted and Entered September 10, 1973, Declaring Zoning Ordinance Invalid.

At a Special Term, Part III of the Supreme Court, held in and for the County of Nassau, Supreme Court Building, Supreme Court Drive, Mineola, New York, on the 10 day of September, 1973.

Present: Hon. Robert C. Meade, Justice.

Index No. 2626/72

Jewish Reconstructionist Synagogue of the North Shore, Inc.,

Plaintiff,

against

The Incorporated Village of Roslyn Harbor and Robert Lisle, John Yost, John Collins, Frank Fahnestock and William DeNeergaard, constituting the Board of Trustees of the Incorporated Village of Roslyn Harbor,

Defendants.

Plaintiff having commenced the above entitled action to declare that § 11-2.14 and § 11-2.30 of the Zoning Ordinance of the Incorporated Village of Roslyn Harbor unconstitutional as applied to churches, schools and synagogues, and

The issues in the above entitled action having duly come on to be heard before Honorable Robert C. Meade, Justice of the Supreme Court of the State of New York, County of Nassau at Special Term Part III of this Court on the 29th day of March, 1973 and the issues having been duly tried on that date and the plaintiff having appeared by Schiff-

Appendix 2, Judgment of Nassau County Supreme Court, Granted and Entered September 10, 1973, Declaring Zoning Ordinance Invalid.

macher, Cullen, Rochford & Farrell, C. Ellis Schiffmacher and John M. Farrell, Jr., of counsel, and the defendants herein having appeared by Pratt, Caemmerer & Cleary, Professional Corporation, by George C. Pratt, of Counsel, and the proofs of both parties having been adduced and their respective counsel having been heard and the Court, after due deliberation, having on the 12th day of July, 1973 duly made and filed a decision in writing in favor of the plaintiff and against the defendants, and

The Court, after due deliberation, having on the 17th day of August, 1973 duly made and filed its decision and order granting, without opposition, defendants' CPLR 4404(b) motion to the extent of modifying its decision, dated July 12, 1973, to the extent of "eliminating therefrom the first two full paragraphs on page 10 thereof" as "suggestive rather than directory in nature",

Now, on motion of Pratt, Caemmerer & Cleary, attorneys for defendants, it is

ADJUDGED, that plaintiff, Jewish Reconstructionist Synagogue of the North Shore, Inc., of 2 Park Circle, Great Neck, New York, have judgment against defendants, Incorporated Village of Roslyn Harbor and Robert Lisle, John Yost, John Collins, Frank Fahnestock and William DeNeergaard, constituting the Board of Trustees of the Incorporated Village of Roslyn Harbor, 50 Glenwood Road, Roslyn Harbor, New York, that sections 11-2.14 and 11-2.30 of the Zoning Ordinance of the Incorporated Village of Roslyn Harbor be and the same hereby are declared unconstitutional insofar as they prevent the Village Board of Appeals from granting to plaintiff a permit to use and occupy premises known and designated as Section 20, Block A, Lots 460 and 465 on the Land and Tax Map of the County of Nassau, for synagogue purposes.

ROBERT C. MEADE
Justice S. C.

BLEED THROUGH

Appendix 3, Order of Appellate Division, Second Department, dated September 6, 1974, Affirming Without Opinion the Judgment of the Nassau County Supreme Court.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on September 6, 1974.

HON. JOHN P. COHALAN, JR.,
Acting Presiding Justice,
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
HON. A. DAVID BENJAMIN
HON. FRED J. MUNDER
Associate Justices

Order on Appeal
From Judgment—Civil Action
or Proceeding

The Jewish Reconstructionist Synagogue of the North Shore, Inc.,

Respondent,

v.

The Incorporated Village of Roslyn Harbor et al., constituting the Board of Trustees of the Incorporated Village of Roslyn Harbor,

Appellants.

In the above entitled cause the above named The Incorporated Village of Roslyn Harbor et al., constituting the Board of Trustees of the Incorporated Village of Roslyn

Appendix 3, Order of Appellate Division, Second Department, dated September 6, 1974, Affirming Without Opinion the Judgment of the Nassau County Supreme Court.

Harbor, defendants, having appealed to this court from a judgment of the Supreme Court, Nassau County, dated September 10, 1973; and the said appeal having been argued by George C. Pratt, Esq., of counsel for the appellants and argued by C. Ellis Schiffmacher, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

Ordered that the judgment appealed from is hereby unanimously affirmed, with costs.

APPELLATE DIVISION OF THE SUPREME COURT
SECOND DEPARTMENT
State of New York

I, Irving N. Selkin, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original here in my office on September 6, 1974 and that this copy is a correct description of said original.

In Witness Whereof I have hereunto set my hand and affixed the seal of this Court on September 6, 1974.

Enter:

Irving N. Selkin,
Clerk of the Appellate Division.

BLEED THROUGH

Appendix 4, Decision Slip of Appellate Division, Second Department, dated September 6, 1974.

Supreme Court of the State of New York
Appellate Division, Second Dept.
—— A D 2d ——

1343 E

The Jewish Reconstructionist Synagogue of the North Shore, Inc., respondent, v. The Incorporated Village of Roslyn Harbor et al., constituting the Board of Trustees of the Incorporated Village of Roslyn Harbor, appellants.

Pratt, Caemmerer & Cleary, Williston Park, N.Y. (George C. Pratt of counsel), for appellants.

Schiffmacher, Cullen, Rochford & Farrell, Great Neck, N.Y. (C. Ellis Schiffmacher and John M. Farrell, Jr. of counsel), for respondent.

Judgment of the Supreme Court, Nassau County, dated September 10, 1973, affirmed, with costs. No opinion.

Cohalan, Acting P.J., Christ, Brennan, Benjamin and Munder, JJ., concur.

September 6, 1974.

The Jewish Reconstructionist Synagogue of the North Shore Inc. v. Inc. Village of Roslyn Harbor

1343 E

Appendix 5, Prevailing Concurring and Dissenting Opinions of New York State Court of Appeals, dated December 4, 1975.

State of New York
Court of Appeals

JEWISH RECONSTRUCTIONIST SYNAGOGUE OF THE NORTH SHORE, INC., Respondent, v. INCORPORATED VILLAGE OF ROSLYN HARBOR et al., Appellants.

Argued October 14, 1975; decided December 4, 1975

Municipal corporations—zoning—restrictions on religious institutions—Appellate Division properly affirmed judgment of trial court which declared unconstitutional, as applied to plaintiff synagogue, 100-foot fixed setback ordinance and special use ordinance which denies permit to religious institutions in residentially zoned areas if there will be any detrimental effect on public health, safety or welfare.

The Appellate Division properly affirmed a judgment of the trial court which declared unconstitutional, as applied to the plaintiff synagogue, a 100-foot fixed setback requirement and a special use ordinance of the Village of Roslyn Harbor which denies a permit to religious institutions in residentially zoned areas if there will be any detrimental effect on public health, safety or welfare.

Jewish Reconstructionist Synagogue of North Shore v. *Incorporated Vil. of Roslyn Harbor*, 45 AD2d 988, affirmed.

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered September 6, 1974, which unanimously affirmed a judgment of the Supreme Court at Special Term (ROBERT C. MEADE, J.), entered in Nassau County, declaring sections 11-2.14 and 11-2.30 of the Zoning

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Appendix 5, Prevailing Concurring and Dissenting Opinions of New York State Court of Appeals, dated December 4, 1975.

Ordinance of the Incorporated Village of Roslyn Harbor unconstitutional insofar as they prevented the village board of appeals from granting to plaintiff a permit to use and occupy certain premises for synagogue purposes.

George C. Pratt and *Samuel S. Tripp* for Village of Roslyn Harbor, appellant. I. The courts below erred in holding that a nonvariable condition for a special exception permit invalidates a zoning ordinance. (*Matter of Board of Educ., Union Free School Dist. No. 17, Town of Oyster Bay* v. *Wolf*, 10 AD2d 713; *Matter of Simensky* v. *Mangravite*, 16 AD2d 977, 12 NY2d 908; *Matter of Boyd* v. *Walsh*, 217 App Div 461; *Matter of Jewish Reconstructionist Synagogue of North Shore* v. *Levitan*, 34 NY2d 827; *Matter of Texas Co.* v. *Sinclair*, 279 App Div 803, 304 NY 817; *Matter of Lynch* v. *Gardner*, 15 AD2d 562.) II. Plaintiff failed to establish that the 100-foot sideyard required legislatively by the Roslyn Harbor Board of Trustees is unreasonable. (*North Shore Unitarian Soc.* v. *Village of Plandome*, 200 Misc 524; *Village of Belle Terre* v. *Boraas*, 416 US 1.)

John M. Farrell, Jr., and *C. Ellis Schiffmacher* for respondent. I. A synagogue is a constitutionally protected use which cannot be excluded from any use district in a municipality. (*Matter of Westchester Reform Temple* v. *Brown*, 22 NY2d 488; *Matter of Diocese of Rochester* v. *Planning Bd. of Town of Brighton*, 1 NY2d 508; *Matter of Community Synagogue* v. *Bates*, 1 NY2d 445; *Matter of New York Inst. of Technology* v. *Le Boutillier*, 33 NY2d 125; *Pelham Jewish Center* v. *Marsh*, 10 AD2d 645; *Matter of Garden City Jewish Centre* v. *Incorporated Vil. of Garden City*, 2 Misc 2d 1009; *Matter of Unitarian Universalist Church of Cent. Nassau* v. *Shorten*, 63 Misc 2d 978; *Brandeis School* v. *Village of Lawrence*, 18 Misc 2d 550;

Matter of Hofstra Coll. v. *Wilmerding,* 24 Misc 2d 248.) II. The standards contained in section 11-2.30 of the zoning ordinance cannot constitutionally be imposed as a prerequisite to the granting of a conditional use permit for a church or synagogue. (*Westbury Hebrew Congregation* v. *Downer,* 59 Misc 2d 387.) III. The board has the inherent power to grant variances as part of its application which cannot be abridged by local ordinances. (*Matter of Bobandal Realties* v. *Worthington,* 21 AD2d 784, 15 NY2d 788; *Matter of Waldorf* v. *Coffey,* 5 Misc 2d 80; *Matter of Fina Homes* v. *Beckel,* 24 Misc 2d 823; *Matter of Texas Co.* v. *Sinclair,* 279 App Div 803, 304 NY 817; *Matter of Lynch* v. *Gardner,* 15 AD2d 562; *Board of Educ., Union Free School Dist. No. 17, Town of Oyster Bay* v. *Wolf,* 10 AD2d 713; *Matter of Simensky* v. *Mangravite,* 16 AD2d 977, 12 NY2d 908; *Matter of Boyd* v. *Walsh,* 217 App Div 461, 244 NY 512; *Matter of North Shore Steak House* v. *Board of Appeals of Inc. Vil. of Thomaston,* 30 NY2d 238.) IV. The nonvariable 100-foot sideyard setback restriction contained in section 11-2.14 of the zoning ordinance is unreasonable when applied to plaintiff.

Fuchsberg, J. We are here confronted with the question of whether a village may by zoning ordinance establish fixed setback requirements applicable to religious institutional uses in an area zoned for residences. If such an invariable requirement is not permissible, then we must also decide whether, on the facts of this particular case, the setback requirement is sufficiently reasonable so that it may be applied to deny this plaintiff a variance. Finally, we are also required to decide whether the ordinances which set forth the bases upon which the requested special use permit is to be granted or denied are valid, since the village has indicated that, under these guidelines, it intends

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to deny the special use permit even if the setback variance is resolved in favor of the synagogue.

The plaintiff is a religious corporation with only approximately 125 family memberships (yielding approximately 300 to 350 individual members, including spouses and children). Organized about eight years before the institution of this litigation, it conducts religious services, maintains a youth program, provides education classes, and conducts various other religious and educational adult programs. During its first years of existence, it used the church buildings of other denominations for its services and programs. It is conceded that its membership is spread over a fairly wide area surrounding the Village of Roslyn Harbor, and that only 4% of its family members actually live in the respondent village itself.

In 1970, plaintiff purchased two adjacent lots in the Village of Roslyn Harbor, together with the buildings thereon. These lots had been part of a large estate which was subdivided into some six or seven residential lots in 1954; four of these are now owned by residents who protest the location of the synagogue so near to their homes. The synagogue seeks to use the former estate house as its meeting place for services and programs and the former guest house as a residence for its Rabbi. The estate house is located some 29 feet from the property line; a zoning ordinance of the village requires that all religious uses located in residential areas be set back at least 100 feet. Although the village granted to its zoning board the power to consider, on various grounds, the suitability of a religious use in the planned location, the board is not given the authority to vary the 100-foot setback requirement.

Accordingly, when the synagogue applied for a special use permit and for the requisite variance, the variance was

denied and, as a consequence, the permit was also denied. The board also indicated that, had not the denial of the variance settled the matter, it would have denied the special permit because of the synagogue's potential effect on traffic and because there was insufficient water pressure in nearby fire hydrants.

The synagogue brought a proceeding under CPLR article 78 to compel the board to grant the requested variance. On appeal to this court, we held that the courts could not compel the board to grant that which it had no power to grant and suggested that a declaratory judgment action would be the appropriate form in which to test the question raised. (34 NY2d 827.) The present appeal is from that declaratory judgment action, the courts below having found that the ordinances in question are unconstitutional.

The judgment should be affirmed. In setting forth our reasons, we indicate, first, the framework within which the issues before us must be decided.

There have been three major cases involving zoning restrictions applied detrimentally to religious institutions in this State. In the first of these *Matter of Community Synagogue* v. *Bates* (1 NY2d 445), we held, *inter alia,* that churches and other religious institutions are beneficial to the public welfare by their very nature and that, therefore, exercises of the police power directed toward determining whether such institutions will harm the public if located in a particular residential area must begin with that assumption. In particular, we forbade localities to bar religious uses on the ground that they had not met a burden of proof that other suitable locations could not be found. While the decision was made in the context of review of an administrative determination under a particular ordinance,

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its language is not limited to the confines of that ordinance or to the procedural posture involved. The special status of religious institutions under the First Amendment freedom of religion is clearly the dominant factor.

In a companion case, *Matter of Diocese of Rochester* v. *Planning Bd.* (1 NY2d 508), we reaffirmed those propositions. We added that the sort of considerations which may figure in a decision to grant or deny a special use permit to other entities, such as commercial ones, may not play the same role in decisions affecting religious uses. Specifically, we held that this was true regardless of whether property values will be affected adversely and whether the local tax base might suffer from the loss of revenue such religious uses entail. In the *Rochester* case, these reasons had been advanced by the town as sufficient to deny the special use permit; no effort to find some accommodation between the needs of the residents and those of the church had been attempted.

It has been forcefully argued to us in the case at bar that there is growing support for the view that churches ought to be subject to the same zoning considerations which are permitted to govern applications from other entities. We are aware that much of the support for the desirability of churches in residential areas descends to us from older case law: "The traditional concept of a small church serving the immediately neighboring community undoubtedly had something to do with the idea that such use was an integral part of community life in 'the best and most open localities.' However the establishment of a modern church, not dependent upon local residents as its communicants, and in some instances attracting people from far distances, the inevitable use of the automobile in connection therewith and the increased activities of the church for

social and community functions having only a remote connection with its primary function, all present a different picture." (1 Rathkopf, Law of Zoning and Planning [3d ed], p 19-8.)

This description no doubt portrays accurately the problems presented by religious uses in residential areas today. Nevertheless, it portrays but one half of the necessary equation. Religion and State, separate and coexisting, do make demands on one another, and the distinctions between the little church around the corner and the modern religious center must, no doubt, be acknowledged and accommodated. But the peculiarly pre-eminent status of religious institutions under the First Amendment provision for free exercise of religion remains an important factor entering into the balance that also weighs the needs or desires of the community.

Indeed the ground rules for such a balance were set forth in *Matter of Westchester Reform Temple* v. *Brown* (22 NY2d 488). There, in discussing the problems involved in honoring the constitutionally protected rights of religious institutions while acknowledging the fact that they do bring traffic in their wake, do impinge on the quiet enjoyment of their immediate neighbors, and do affect the tax base of a town, we held (pp 496-497): "We have not said that considerations of the surrounding area and potential traffic hazards are unrelated to the public health, safety or welfare when religious structures are involved. We have simply said that they are outweighed by the constitutional prohibition against the abridgment of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community. If the community can, consistent with this policy, both comply with the constitutional requirement and, at

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the same time, avoid or minimize, insofar as practicable, traffic hazards or other potential detriments bearing a substantial relation to the health, safety and welfare of the community, there is no barrier to its doing so. Nevertheless, we have already decided in the *Rochester* case that, where an irreconcilable conflict exists between the right to erect a religious structure and the potential hazards of traffic or diminution in value, the latter must yield to the former."

Thus the question before us now is whether the ordinances of the Village of Roslyn Harbor contain guidelines which promote such a permissible kind of compromise or whether, either on their faces or as applied, they restrict religious uses without recognizing their special, protected status under the First Amendment. So phrased, the question is clearly the same one which must always be asked when the exercise of the police power conflicts with the exercise of a First Amendment right. (See *People* v. *Taub*, 37 NY2d 530; *Cantwell* v. *Connecticut*, 310 US 296; *Sherbert* v. *Verner*, 374 US 398; *Wilconsin* v. *Yoder*, 406 US 205.)

Unlike the ordinances which we upheld in the *Westchester* case,[1] which required the authorities to consider the effects of a religious use upon residents and to set building size and lot restrictions to *avoid or minimize "insofar as practicable"* any detrimental effects (22 NY2d, 495), the special use ordinance before us directs authorities to *deny*

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[1] It has been argued here that the *Westchester* case ought not to apply to these facts because, in that case, the church already occupied property at the chosen location and its expansion was the subject of the dispute. But we said explicitly, in *Westchester*, that the considerations which apply to initial location and those which apply to planned expansions are identical. (22 NY2d 488, 493.)

the use permit if they find that the religious use will have *any* detrimental effect on public safety, health, or welfare, including effects on traffic, on fire safety, and on the character of the surrounding neighborhood. It contains no substantial requirement that efforts to accommodate or mitigate these effects be made. (See Anderson, New York Zoning Law and Practice [2d ed], §§ 9.29-9.34.)

The variance ordinance falls to the same analysis. While residents may apply for variances from setback requirements and the board may grant them, religious uses are subjected to an invariable requirement of 100 feet. We need not address the potential violation of equal protection which may be involved in such a differentiation; indeed there may be none, for it can be argued that churches and synagogues do present sufficiently different problems so that they may be treated separately from residences without offending that clause of the Constitution. (See 2 Anderson, American Law of Zoning, §§ 9.19-9.25.) Rather, the invariability of the ordinance offends against the requirement that efforts to accommodate religious uses be made. There could well be situations in which no detriment to any aspect of public safety or welfare would result from a setback of less than 100 feet.[2]

Nor is invariability the only evil in the ordinance. Its application to the synagogue in this case is not supported

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[2] There is also involved here a request for a variance of the setback requirements to accommodate the location of the guest house which will be used to house the congregation's Rabbi. While it presently meets residential requirements, under the village's zoning ordinances, it becomes an accessory use to the main building and is thus required to have a larger setback. Our rulings with respect to the primary setback dispute apply with equal force to the guest house setback.

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by sufficient evidence to justify it. While there is, in the record, only some indication that there may be traffic or noise-related inconvenience to the synagogue's immediate neighbors, or problems with fire protection, there is no hard evidence to that effect, nor that any effort was made to find ways to mitigate these inconveniences short of outright denial of the variance. While this no doubt stems from its intransigent nature, which denied the board power to modify it for any reason, that does not mean we must simply remit this case for further findings as to what setback, if any, is a reasonable one. As already indicated, the existing building which the synagogue wishes to use already sits, as it has for a long time, some 29 feet from the property line. Given this record, the question which the village must answer is not whether 29 feet is reasonable, but rather, what reasonable measures can be taken to mitigate the effect upon the neighbors of having a synagogue 29 feet from the property line.[3]

The record makes clear that the village's objections to the location chosen by the synagogue are founded on no more than perceived inconveniences. The village's own ordinances reflect a policy which labels acceptable a distance of 125 feet between a religious building and the nearest residence, since these ordinances permit a residence to be located 25 feet from its property line and would permit a church to be located 100 feet from its property line. The

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[3] We note that the original decision of the zoning board states that body's recognition of the synagogue's offer to meet any reasonable requirement for modification or adaptation in order to bring the structures within existing requirements. The synagogue also consented to continuing jurisdiction of the board for as long as necessary in order to assure the board that all such requirements had been met.

record discloses, that, in fact, the nearest house is 106 feet away from the synagogue building. Requiring the synagogue to observe the 100-foot setback in these circumstances would place it some 177 feet away from the nearest house or, put another way, the village's determination to exclude the synagogue is based on a mere 19-foot discrepancy between reality and the village's own statutory ideal. Since the cost to the synagogue of moving the building or constructing new facilities in its place is greater than it can afford, such a requirement would be tantamount to a denial of the use permit.

There remains the assertion made by the village that, since so few of its members live in the Village of Roslyn Harbor, the synagogue should be subject to a requirement that it demonstrate that there is no more suitable place for it elsewhere. We disposed of that contention in *Matter of Community Synagogue* v. *Bates*, 1 N.Y.2d 445, 154 N.Y.S.2d 15, 136 N.E.2d 488, (*supra*). As a variation on this theme, however, the village argues that if it, rather than the synagogue, can show the inappropriateness of location, then it may exclude a religious use, citing to our decision in *Matter of Diocese of Rochester* v. *Planning Bd.*, 1 N.Y.2d 508, 154 N.Y.S.2d 849, 136 N.E.2d 827, *supra*. We did indicate, in that case, that it might be possible for a town to exclude religious uses where all other exceptions to the residential character of the area are also excluded.[4] But we did not say this could be done for no better reason than that a number of the members of the church do not live in the town. As Mr. Justice Meade correctly noted in

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[4] But see *North Shore Unitarian Soc.* v. *Village of Plandome*, 200 Misc. 524, 109 N.Y.S.2d 803; *Pelham Jewish Center* v. *Marsh*, 10 A.D.2d 645, 197 N.Y.S.2d 258.

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his decision below, the status of religious uses as protected under the First Amendment is the source of their desirability in the community; such First Amendment rights have never, to our knowledge, been limited to being exercised within the boundaries of one's own place of residence. Moreover, as we noted in *Community Synagogue,* the power to decide where churches may not locate becomes the power to say where they may do so. That is impermissible.

In sum, to the extent that the ordinances of the Village of Roslyn Harbor authorize the denial of a special use permit for location of religious institutions in a residential district without setting reasonable requirements for adaptations which would mitigate their effects, the ordinances are unconstitutional. Accordingly, the order below must be affirmed in all respects.

BREITEL, Chief Judge (concurring).

I concur in result to affirm. I agree with so much of the dissent as characterizes the majority expression of the law as too absolutist in providing a preference and even to some extent an immunity from significant zoning regulation for premises devoted to religious uses. On the other hand, I cannot agree with the dissent that significant factors in the treatment of religious premises should be the service of members of its congregation in the community, that its presence may lessen property value, or that a religious group may be required to choose among alternatives less offensive to the chosen milieu.

Fundamentally, the law should move in the direction of requiring even religious institutions to accommodate to factors directly relevant to public health, safety, or welfare, inclusive of fire and similar emergency risks, and traffic

conditions insofar as they involve public safety (cf. *Matter of Diocese of Rochester* v. *Planning Bd.*, 1 NY2d 508, 526; see, generally, 1 Rathkopf, Law of Zoning and Planning [3d ed], p 19-17). Indeed, even in *Matter of Westchester Reform Temple* v. *Brown* (22 NY2d 488, 496), while stating that these considerations could not outweigh the constitutionally-based ruling favoring religious institutions, the court recognized that "considerations which may wholly justify the exclusion of commercial structures from residential areas • • • [may] • • • be considered for the purpose of minimizing, insofar as practicable, the impairment of surrounding areas or the danger of traffic hazards". It is the all but conclusive presumption that considerations of public health, safety and welfare are always outweighed, as some of the precedents suggest, by the policy favoring religious structures that I find objectionable. Hence, my rejection of the absolutist view expressed in the majority opinion, although to be sure there is the broad language in the precedents which might support that view.

I vote to affirm, since on this record, and considering the several grounds for preventing the village board of appeals from granting plaintiff a special permit, it is likely that the effect, if not the purpose, of the ordinance is exclusionary, without compensating values to sustain a public purpose related to public safety and public welfare. The overall impact of the restrictions in the ordinance as it now reads does not accommodate sufficiently to the priorities, albeit limited, that should be accorded to religious institutions.

Jones J. (dissenting). We think the time has come and that this is an appropriate case in which to breathe vitality into the so far lifeless words of Judge Froessel that, notwithstanding that churches, with schools, enjoy a favored

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status in the law of zoning, nonetheless, they can be held subject to "appropriate restrictions" (*Matter of Diocese of Rochester* v. *Planning Bd.*, 1 NY2d 508, 526). In our view New York should approach the position taken by the growing number of States holding what has been termed the "minority view" (1 Rathkopf, Law of Zoning and Planning [3d ed], pp 19-4—19-5; *Corporation of Presiding Bishop of Church of Latter-Day Saints* v. *City of Porterville*, 90 Cal App 2d 656, app dsmd 338 US 805, rehearing den 338 US 939; *Minney* v. *City of Azusa*, 164 Cal App 12; *West Hartford Methodist Church* v. *Zoning Bd. of Appeals*, 143 Conn 263; *Milwaukie Co. of Jehovah's Witnesses* v. *Mullen*, 214 Ore 281; *St. James Temple of A. O. H. Church of God* v. *Board of Appeals*, 100 Ill App 2d 302, cert den 395 US 946; *Miami Beach United Lutheran Church* v. *City of Miami Beach*, 82 So 2d 880 [Fla]).

The issue here is not the validity of a zoning ordinance which totally excludes churches and synagogues from a residential district, or even the validity of the present regulatory ordinance in all circumstances. Rather the question is the validity of the 100-foot sideline setback restriction of this ordinance as applied specifically to respondent synagogue.

There is obvious merit to the proposition that churches, synagogues and other institutions dedicated to religious objectives in consequence of their high purpose and moral worth make a unique contribution to the public welfare. But that is not all of it. They also bring congestion; they generate traffic and create parking problems; they can cause a deterioration of property values in a residential zone; in consequence of customary exemption from taxation they work an economic disadvantage to taxable prop-

erties (perhaps recognized as increasingly less acceptable today when the percentage of actual use of large and impressive institutional facilities is often very low indeed).

Turning to the case before us, we recognize that churches and synagogues occupy a special position along our scale of societal values and we do not suggest that their status should be leveled to that of all other users of property. We cannot agree, however, that the result in which the majority here acquiesces commends itself either to sound legal doctrine or to common sense.

First, as to the more strictly legal aspects of the matter we find encouragement in the writings if not the actual decisions of several reported cases (*Matter of New York Inst. of Technology* v. *Le Boutillier,* 33 NY2d 125, 131; *Matter of Westchester Reform Temple* v. *Brown,* 22 NY2d 488, 494; *Ginsberg* v. *Yeshiva of Far Rockaway,* 45 AD2d 334, 337-388, affd 36 NY2d 706; *Matter of Westchester Reform Temple* v. *Griffin,* 52 Misc 2d 726, affd 29 AD2d 672, 728-729, affd 22 NY2d 488, 496; *St. James Temple of A.O.H. Church of God* v. *Board of Appeals,* 100 Ill App 2d 302, cert den 395 US 946; *Board of Zoning Appeals* v. *Decatur, Indiana Co. of Jehovah's Witnesses,* 233 Ind 83; and see Churches and Zoning, 70 Harv L Rev 1428). We do not perceive that the constitutional guaranties of freedom of worship are always absolute and invariable. It even appears that in the past judicial attention has been preoccupied with the status and characteristics of the religious *users* rather than addressed to the functional aspects of the religious *uses.* Thus, today the facilities of religious institutions are properly and fittingly made available for use by other religious and community organizations and groups. Indeed this congregation until now has

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itself been the beneficary of that practice. To this extent, the uses to which the buildings of religious institutions are put, from the standpoint of the protection of the public welfare, are no different from those of other places of community assembly and activity. As the Supreme Court of Florida has observed: "It is commonly known that generally the activities of the present-day churches are wide and varied as, indeed, they should be. The use of church buildings and facilities is not confined to worship periods on Sunday and mid-weekly prayer meetings. They are often used as places of instruction and entertainment. We do not frown upon these activities; on the contrary we think they should be promoted and encouraged. But we do not agree that because of the merits of these activities it can be said that an infringement of the constitutional rights of the owner results if it is not allowed use of the property for such purposes in the midst of a section of the city which has been restricted, and which the appellee in this instance knew had been restricted, primarily to homes to be occupied by individual families." (*Miami Beach United Lutheran Church* v. *City of Miami Beach*, 82 So 2d 880, 882 [Fla], *supra.*) It cannot be successfully contended, other than in an absolutist perspective, that the application of sensitively, minimally designed regulation of religious and educational uses would materially adversely affect the full and free exercise of religious or educational freedom.

We turn then to the factual aspects of the application of the particular regulation to which it is sought to subject this respondent. At the outset we note that this synagogue is not a long-term or even a short-term member of the Roslyn Harbor community. It is a newcomer which purchased the property in question with full awareness of

the regulatory provisions of the local zoning ordinance which had predated the synagogue's interest in the property by 20 years. Beyond that this synagogue comes not to serve the religious or other needs of residents of Roslyn Harbor but of members of its own congregation from nearby municipalities. Thus only 4 of the 125 member families live in the Village of Roslyn Harbor; 55 families live outside the village limits in the densely populated Roslyn area south of Northern Boulevard; 27 families live miles away in the Great Neck area; and 26 families live in scattered other places on the North Shore. There is no evidence in the record before us that respondent synagogue could not have found an appropriate available location elsewhere in the Village of Roslyn Harbor or in one of the adjoining municipalities. It does not appear that an appropriate synagogue facility could not be constructed on the 2.4-acre parcel with full observance of the prescribed 100-foot sideline setbacks. It is true that respondent synagogue could not use the buildings presently located on the property and that new construction would be expensive—but all this was well known to it when the recently organized synagogue purchased the premises.

Given the reasonable expectation that use of the premises on Glenwood Road for synagogue purposes will surely increase vehicular traffic in the area and create parking problems, not only endangering the comfort and convenience of residents of the community but also creating hazards to public health and safety, we cannot conclude that there are constitutional or other legal considerations which preclude the application of what to us are the reasonable provisions of this zoning ordinance to this property owner in the circumstances presented in this record. Rather we would conclude that there is a reasonable relationship between

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the zoning regulation as sought to be applied here and the public health, safety and general welfare of the Village of Roslyn Harbor, and that the application of such regulation would not infringe the legitimate interests of respondent synagogue. The time has come when our court should forthrightly face the legal, economic and social implications of continued slavish adherence to the outmoded doctrine that churches and synagogues are wholly immune from even reasonable zoning regulation.

We would reverse the order of the Appellate Division and remit the case to Supreme Court, Nassau County, for entry of judgment declaring sections 11-2.14 and 11-2.30 constitutional as applied to respondent synagogue.

Judges GABRIELLI and COOKE concur with Judge FUCHSBERG; Chief Judge BREITEL concurs in result in a separate opinion in which Judge WACHTLER concurs; Judge JONES dissents and votes to reverse in another separate opinion in which Judge JASEN concurs.

Order affirmed, with costs.

Appendix 6, Order of New York State Court of Appeals, dated December 4, 1975, Affirming Order of Appellate Division, Second Department.

State of New York
Court of Appeals

The Jewish Reconstructionist Synagogue
of the North Shore, Inc.

Respondent,

vs.

The Incorporated Village of Roslyn Harbor, et al.,

Appellants.

BE IT REMEMBERED, That on the 22nd day of January in the year of our Lord one thousand nine hundred and seventy-five, the Incorporated Village of Roslyn Harbor, et al., the appellants in this cause, came here unto the Court of Appeals, by Pratt, Caemmerer & Cleary, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And the Jewish Reconstruction Synagogue of the North Shore, Inc., the respondent in said cause, afterwards appeared in said Court of Appeals by Schiffmacher, Rochford & Cullen, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. George C. Pratt of counsel for the appellants, and by Mr. John M. Farrell, Jr. of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

BLEED THROUGH

Appendix 6, Order of New York State Court of Appeals, dated December 4, 1975, Affirming Order of Appellate Division, Second Department.

Opinion by Fuchsberg, J. All concur, Breitel, Ch. J., in result in a separate opinion in which Wachtler, J., concurs; except Jones, J., who dissents and votes to reverse in an opinion in which Jasen, J., concurs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order is affirmed &c. AS AFORESAID.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

DONALD M. SHERAW
Deputy Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, December 4, 1975

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

DONALD M. SHERAW
Clerk.

Appendix 7, Order of New York State Court of Appeals, dated March 30, 1976, Denying Village's Motion for Reargument or in the Alternative Amendment of the Remittitur.

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirtieth day of March A. D. 1976.

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

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2 Mo. No. 281
THE JEWISH RECONSTRCTIONIST SYNAGOGUE OF THE NORTH SHORE, INC.,

Respondent,

VS.

THE INCORPORATED VILLAGE OF ROSLYN HARBOR, et al.,

Appellants.

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

(SEAL)

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

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Appendix 8, Sections 11-2.2, 11-21.14, and 11-2.30 of the Building Zone Ordinance of the Incorporated Village of Roslyn Harbor, Nassau County, New York.

Section 11-2.2. The Board of Appeals, in addition to the powers and duties specified in the Village Law, shall have the power to the extent hereinafter set forth, after public notice and hearing, and subject to appropriate conditions and safeguards, to determine and vary the application of the regulations herein established in harmony with the purposes enumerated in the Village Law and the general purpose and intent of these regulations, as hereinafter provided:

Section 11-2.14. Permit in any district churches, public and parochial primary and secondary schools and clubs not operated for a profit. Every application to the Board of Appeals shall be accompanied by a plan showing the location of the intended building and structures to be erected upon the property affected. The Board of Appeals shall require that the applicant provide an off street parking area of such size as in the judgment of the Board of Appeals shall be adequate for the number of persons who may be accommodated in such building. No such building shall be erected or be used for such purposes within one hundred and fifty (150) feet of any street line nor within one hundred (100) feet of any property line.

Section 11-2.30. On all applications for permits under Sections 11-2.2 and following sections, the Board of Appeals in addition to the requirements hereinabove set forth shall give consideration to the health, safety, morals, convenience and general welfare of the village and of its property owners and residents and shall act in harmony with the general purpose and intent of this ordinance and the applicable provisions of the Village Law.

Appendix 8, Sections 11-2.2, 11-21.14, and 11-2.30 of the Building Zone Ordinance of the Incorporated Village of Roslyn Harbor, Nassau County, New York.

The determination of the Board of Appeals on all applications under Sections 11-2.2 and following shall be made in accordance with the comprehensive plan and design set forth in this ordinance and the purpose and intent set forth in the title, subtitle and the preamble thereto and in Section 177 of the Village Law. The Board shall not authorize the issuance of any permit under any of the provisions of Section 11-2.2 and following, unless it finds in each case that the proposed use of the property or the erection, alteration or maintenance of the proposed building or structure:

(a) Will not depreciate or tend to depreciate the value of property in the Village.

(b) Will not create a hazard to health, safety, morals and general welfare, and will not be detrimental to the neighborhood or to the residents thereof.

(c) Will not alter the essential character of the neighborhood.

(d) Will not otherwise be detrimental to public convenience and welfare.

Before authorizing the issuance of any permit under Sections 11-2.3, 11-2.4 and 11-2.14 said Board, in addition to the foregoing findings, shall find that the proposed use or the erection, alteration and maintenance of the proposed building and structure will not be feasible or practicable in a less restricted district. Said Board shall also give consideration to the following: Accessibility of the premises for fire and police protection; access of light and air to the premises and adjoining property, traffic problems transportation and requirements and facilities, haz-

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Appendix 8, Sections 11-2.2, 11-21.14, and 11-2.30 of the Building Zone Ordinance of the Incorporated Village of Roslyn Harbor, Nassau County, New York.

ards from fire the size, type and kind of buildings and structures in the vicinity where the public is apt to gather in numbers; and before authorizing the issuance of any permit for such proposed use or the erection of the proposed building and structure, the Board may require the applicant to submit reports from the following: The Bureau of Fire Prevention, if any, as to fire hazards, if any; the Chief of Police, as to traffic hazards, if any, and the administrative officials as to the type and design of the proposed buildings and structures.

All of the buildings and structures for which permits are authorized to be granted by the Board under § 11-2.2 and following shall, except as otherwise specifically provided in said sections, be in accordance with height, area and yard requirements prescribed in this ordinance and all such buildings and structures shall conform with all applicable laws and regulations relative to their construction, location operation and maintenance.

75-1666

Supreme Court, U. S.
FILED
JUN 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE INCORPORATED VILLAGE OF ROSLYN HARBOR, ROBERT LISLE, JOHN YOST, JOHN COLLINS, FRANK FAHNESTOCK and WILLIAM DeNEERGAARD, constituting the Board of Trustees of the Incorporated Village of Roslyn Harbor,

Petitioner,

against

THE JEWISH RECONSTRUCTIONIST SYNAGOGUE OF THE NORTH SHORE, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

JOHN M. FARRELL, JR.,
Attorney for Respondent
98 Cutter Mill Road
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SCHIFFMACHER, CULLEN & FARRELL
Of Counsel

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Anderson, American Law & Zoning (1968 Ed.)
§ 9.19 9

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE INCORPORATED VILLAGE OF ROSLYN HARBOR, ROBERT LISLE, JOHN YOST, JOHN COLLINS, FRANK FAHNESTOCK and WILLIAM DeNEERGAARD, constituting the Board of Trustees of the Incorporated Village of Roslyn Harbor,

Petitioner,

against

THE JEWISH RECONSTRUCTIONIST SYNAGOGUE OF THE NORTH SHORE, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

Question Presented

The only issue raised by this petition is whether there is a substantial federal question which has not been previously determined by the Supreme Court or decided in a way not in accord with its decisions. (Rule 19 of the Rules of the Supreme Court of the United States.)

The existence of a substantial federal question must be gleaned from the issue decided in this action by the Courts of the State of New York. The Court of Appeals in its decision resolved three questions:

1. Whether a municipality can, by the enactment of a local ordinance, abridge the power to grant variances given

to boards of zoning appeals by the legislature of the State of New York. The Courts below answered this question in the negative.

2. Whether, considering the facts of this case, those provisions of the Building Zone Ordinance of the Incorporated Village of Roslyn Harbor (hereinafter referred to as the Zoning Ordinance) which state that a building housing a religious use is to be set back 100 ft. from the side line of the property on which it is built, can be declared to be unreasonable and invalid when such provisions are unsupported by sufficient evidence to justify their application. The courts below answered this question in the affirmative.

3. Whether standards imposed in a zoning ordinance as conditions for the grant of a special exception can be unconstitutional when applied to deny a church or synagogue the use of its property for religious purposes. The courts below answered this question in the affirmative.

Respondent maintains that none of these issues raise a substantial federal question and, as a result, this petition should be dismissed.

Statement of Facts

The decision of the Court of Appeals of the State of New York, which is sought to be reviewed by this petition for a writ of certiorari is the culmination of over five years of litigation involving the right of respondent to construct a synagogue on its property on the west side of Glenwood Road in the Incorporated Village of Roslyn Harbor, which is located on the north shore of Long Island, in Nassau County, New York.

Respondent purchased its property consisting of approximately 2½ acres of land improved with a large one-

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family colonial type dwelling and a smaller cottage on October 29, 1970 (28a and 29a).* In February 1971 an application was made to the Board of Appeals of the Incorporated Village of Roslyn Harbor for a conditional use permit and variances so that respondent could use the colonial house for its synagogue and the cottage as a residence for its rabbi (35a). The conditional use permit was requested because § 11-2.14 of the Zoning Ordinance makes churches, schools and non-profit clubs special exceptions throughout the Village. That section also requires buildings used for those purposes to be 150 ft. from the street and 100 ft. from any side or rear property line.

The standards and conditions for the granting of a special exception are contained in § 11-2.30 of the Zoning Ordinance. One of the standards there enumerated is that the Board of Appeals can grant a special exception only if all the buildings and structures which are the subject of the use permit are in conformity with the height, area and yard requirements of the Zoning Ordinance. (The applicable zoning ordinances are set forth at pp. 3a through 5a of Appendix 1 to the Petition for a Writ of Certiorari).

Respondent's property is located in the Residence A District of the Village in which single family dwellings on plots of at least one acre are permitted uses (30a). The principal residence is set back 29.6 ft. from the southerly property line of respondent's property and when occupied as a one family dwelling, was in full compliance with all applicable provisions of the Zoning Ordinance, the side yard set back provisions for such use being 25 ft. However, because § 11-2.14 of the Zoning Ordinance requires structures used for religious purposes to be set back 100 ft. from a side line, respondent required a variance in order to use

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* Unless otherwise indicated, this and other references are to pages in the Record on Appeal to the Court of Appeals of the State of New York.

the main dwelling for its synagogue. At the same time that respondent applied for the special exception and side yard set back variance, it also asked that the Board grant a variance of § 4-10.2 of the Zoning Ordinance which requires all accessory structures to be located in the rear yard, because the cottage which is to be used for the residence for respondent's rabbi, when so occupied, becomes an accessory structure located in the front yard of the synagogue (36a).

Respondent's applications were the subject of three lengthy hearings before the Board of Appeals, starting in April and ending in June, 1971 (39a). At these hearings, detailed testimony was introduced as to the effect of the proposed use on property values in the area, whether any change in the character of the neighborhood would occur and how the use of the property as a synagogue would influence existing traffic patterns (101a through 106a).

In November, 1971, the Board of Appeals denied the special exception and the variances on the grounds that (a) it lacked the authority to grant any variance to respondent because § 11-2.30 of the Zoning Ordinance authorized a Board to grant a special exception for a religious use only if there were full compliance with all of the area requirements of the Zoning Ordinance and (b) had the Board of Appeals the authority to grant such a conditional use permit it would have denied it to respondent, in any event (112a and 113a).

Respondents thereafter commenced a proceeding brought pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York in Supreme Court, Nassau County, to review and annul the determination of the Board of Appeals. This proceeding was dismissed on the ground that the Board of Appeals did not have the jurisdiction to grant the relief sought because it lacked the authority to vary the provisions of the Zoning Ordinance in conjunction with an application for a conditional use permit for

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religious purposes (decision of Supreme Court unreported) and the Appellate Division, Second Department, affirmed that judgment, with two justices dissenting (41 A. D. 2d 537). An appeal to the Court of Appeals of the State of New York resulted in an affirmance of the determination of the lower courts, that Court in its memorandum decision, noting that a declaratory judgment action was pending in which "all the issues would be ventilated" 34 N.Y.2d 827, 829. The declaratory judgment action to which the Court of Appeals referred was an action commenced by respondent to declare those provisions of § 11-2.30 of the Zoning Ordinance unconstitutional which imposed standards on a special exception for a church or synagogue and which deprived the Board of Appeals of the authority to grant a conditional use permit, if the applicant also requested an area variance. Respondent also requested a declaration in that action that the 100 ft. side yard set back provisions of § 11-2.14 of the Zoning Ordinance were, as they applied to respondent's property, unconstitutional (pp. 26a through 122a).

After a trial at Supreme Court, Nassau County, Mr. Justice Robert C. Meade rendered a decision granting respondent the declaratory relief it requested. (Mr. Justice Meade's decision is Appendix No. 1 to the Petition for a Writ of Certiorari). Petitioner appealed to the Appellate Division, Second Department of the Supreme Court of the State of New York, which unanimously affirmed Mr. Justice Meade's decision and the judgment entered thereon without opinion (Appendix No. 3 to the Petition for a Writ of Certiorari). Petitioner thereafter appealed to the Court of Appeals of the State of New York and it is from the decision of that Court that this petition is brought.

ARGUMENT

POINT I

The determination of the courts of the State of New York that a municipality cannot enact a Zoning Ordinance that applies invariable area restrictions to religious uses does not present a substantial federal question.

The decision of Mr. Justice Robert C. Meade at Supreme Court, Nassau County (Appendix No. 1) held that the provisions of § 11-2.30 of the Zoning Ordinance which forbade the Board of Appeals from granting a special exception to a church or synagogue unless there were full compliance with the area requirements of the Zoning Ordinance, including the provisions of § 11-2.14 thereof, which mandated a 100 ft. side yard set back, to be unconstitutional because the Village was, by local ordinance, abridging the legislative grant of power conferred upon boards of appeals in § 179-b (now § 7-712) of the Village Law of the State of New York (p. 10a of Appendix No. 1). Judge Fuchsberg, writing for the majority of the Court of Appeals, found the inflexible area requirements of the Zoning Ordinance offensive, when applied to religious uses (p. 26a of Appendix No. 5 to the Petition for a Writ of Certiorari).

The conclusion of all the courts of the State of New York was that the invariability of the Zoning Ordinance made it unconstitutional. Whether the reasons for such a finding of unconstitutionality were the illegal restriction of the powers of the Board of Appeals or the failure of the Zoning Ordinance to attempt to accommodate to religious uses, it cannot be said that the basis for the determination was that the Zoning Ordinance infringed upon the free exercise of religion. Accordingly, no substantial federal question is presented with respect to this issue.

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POINT II

No substantial federal question is presented by the finding that the 100 ft. side yard restriction in § 11-2.14 of the Zoning Ordinance, is unreasonable, when applied to the synagogue property.

The Court of Appeals held that the application of the 100 ft. side yard set back provisions of § 11-2.14 of the Zoning Ordinance, when applied to respondent's property, was, under the circumstances presented in this case, unreasonable, Judge Fuchsberg saying:

> "Nor is invariability the only evil in the ordinance. Its application to the synagogue in this case is not supported by sufficient evidence to justify it. While there is, in the record, only some indication that there may be traffic or noise-related inconvenience to the synagogue's immediate neighbors, or problems with fire protection, there is no hard evidence to that effect nor that any effort was made to find ways to mitigate these inconveniences short of outright denial of the variance. While this no doubt stems from its intransigent nature, which denied the board power to modify it for any reason, that does not mean we must simply remit this case for further findings as to what set-back if any, is a reasonable one. As already indicated, the existing building which the synagogue wishes to use already sits, as it has for a long time, some 29 feet from the property line. Given this record, the question which the Village must answer is not whether 29 feet is reasonable, but rather, what reasonable measures can be taken to mitigate the effect upon the neighbors of having a synagogue 29 feet from the property line.
>
> The record makes clear that the village's objections to the location chosen by the synagogue are founded on no more than perceived inconvenience. The village's own ordinances reflect a policy which labels acceptable

a distance of 125 feet between a religious building and the nearest residence, since these ordinances permit a residence to be located 25 feet from its property line and would permit a church to be located 100 feet from its property line. The record discloses, that, in fact, the nearest house is 106 feet away from the synagogue building. Requiring the synagogue to observe the 100 foot setback in these circumstances would place it some 177 feet away from the nearest house, or, put it another way, the village's determination to exclude the synagogue is based on a mere 19-foot discrepancy between reality and the village's own statutory ideal. Since the cost to the synagogue of moving the building or constructing new facilities in its place is greater than it can afford, such a requirement would be tantamount to a denial of the use permit." (pp. 26a to 28a Appendix 5 to Petition for a Writ of Certiorari).

It is obvious from this language that the court's determination was a factual one confined to the situation presented in this case, that it involved no constitutional issue, and, consequently, it embraced no federal question.

POINT III

The holding by the Court of Appeals that the standards of § 11-2.30 of the Zoning Ordinance cannot be employed to exclude religious uses from residential districts of the Village of Roslyn Harbor, involves a question of public policy of the State, not the First Amendment guarantee of the right to free exercise of religion.

If there is the germ of a federal question in any of the issues decided by the Court of Appeals, it is the holding by that Court that the standards contained in § 11-2.30 of the Zoning Ordinance can not be applied to exclude re-

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spondent from its property in the Village of Roslyn Harbor. However, a capsule review of the decisions of the states holding apparently conflicting views on this and related points will show that if a conflict in the decisional authority does exist, it is not in the area of the Court of Appeals decision because what the Court of Appeals decided, was a policy question not a federal constitutional issue.

It is the general consensus that a municipality cannot enact a land use ordinance that completely excludes religious uses. *North Shore Unitarian Society* v. *Plandome,* 200 Misc. 524, 109 N.Y.S.2d 803; *State ex rel. Lake Drive Baptist Church* v. *Village of Bayside Board of Trustees,* 12 Wisc.2nd 585 108 N. W. 2nd 288; Anderson, American Law of Zoning, § 9.19). However, a dichotomy does exist with respect to whether a municipality can exclude a religious use from a residential district or districts in a municipality. The majority view, which is followed by the State of New York, is that religious uses may not be excluded from residential districts. *Matter of Diocese of Rochester* v. *Planning Board,* 1 N.Y.2nd 508, 136 N.E.2nd 827; *Matter of Community Synagogue* v. *Bates,* 1 N.Y.2d 445, 136 N.E.2d 488; *Matter of Westchester Reform Temple* v. *Brown,* 22 N.Y.2d 488, 239 N.E.2nd 891; *State ex rel. Synod of Ohio* v. *Joseph,* 139 Ohio St. 229, 39 N.E.2d 515; *Congregation Dovid ben Nuchim* v. *Oak Park,* 40 Mich. App. 698, 199 N.W.2d 557; *Board of Zoning Appeals* v. *Decatur Company of Jehovahs Witnesses,* 233 Ind. 83, 117, N.E.2d 115; *State ex rel. Lake Drive Baptist Church* v. *Village of Bayside Board of Trustees, supra; Anderson American Law of Zoning, § 9.19.* On the other hand, California and Florida espouse the minority view that a municipality may exclude religious uses from certain residential areas. *Corporation of Presiding Bishop of Church of Latter Day Saints* v. *City of Porterville,* 90 Cal. App. 2nd 656, 203 P. 2nd 823, app. dism., 338 U.S. 805; *Minney* v. *Azusa,* 164 Cal.App. 2nd 12, 330 P. 2nd 255 app.

dism. 359 U.S. 436; *Miami Beach United Lutheran Church* v. *Miami Beach,* 82 So.2nd 880. Contrary to petitioners contention, neither the constitutionality nor the propriety of the majority or minority view is at issue in the instant case. Because § 11-2.14 of the Zoning Ordinance provides that a church or synagogue is condtionally permitted throughout the Village of Roslyn Harbor, there is no question as to whether a church can constitutionally be excluded from a residential district.

The specific point presented is what standards and conditions can be applied to control a conditionally permitted religious use. The majority, concurring and dissenting opinions of the Judges of the Court of Appeals in this case, are a microcosm of the differing views prevailing in various states. The majority decision of the Court of Appeals is a reaffirmation of the New York rule, expounded in *Matter of Diocese of Rochester* v. *Planning Board of Brighton, supra; Matter of Community Synagogue* v. *Bates, supra; Matter of Westchester Reform Temple* v. *Brown, supra,* that a municipality may impose reasonable regulations on a religious use, but as Judge Kenneth Keating said in *Matter of Westchester Reform Temple* v. *Brown, supra,* at pp. 496 and 497:

> ". . . We have not said that considerations of the surrounding area and potential traffic hazards are unrelated to the public health, safety or welfare when religious structures are involved. We have simply said that they are outweighed by the constitutional prohibition against the abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community. If the community can, consistent with this policy, both comply with the constitutional requirement, and, at the same time, avoid or minimize, insofar as practicable, traffic hazards or other potential detriments bearing a substantial relation to the

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> health, safety and welfare of the community, there is no barrier of its doing so. Nevertheless, we have already decided in the Rochester case that, where an irreconcilable conflict exists between the right to erect a religious structure and the potential hazards of traffic or diminution in value, the latter must yield to the former."

Under this rule, standards in a Zoning Ordinance that permit a special exception can be granted for a religious use only if it is found that the religious use will not tend to depreciate property values, will not create a hazard to health, safety, morals and the general welfare, will not alter the essential character of a neighborhood, will not be detrimental to public convenience and welfare or will not be feasible in a less restricted district cannot be constitutionally applied to exclude such use.

Other states, typified by Oregon in *Milwaukie Company of Jehovah's Witnesses* v. *Muller,* 214 Or. 281, 33 P.2nd 5, app. dismissed and cert. denied 359 U.S. 436 and Connecticut in *West Hartford Methodist Church* v. *Zoning Board,* 143 Conn. 263, 121 A.2d 640, have held that conditionally permitted religious uses are subject to the same standards as other uses and a special exception can be denied if for example, it is proved that the religious use will cause injury to neighboring property or result in traffic hazards or congestion.

The dissenting opinion of Judge Jones in the Court of Appeals would have the State of New York follow Oregon and Connecticut. The concurring opinion of Judge Breitel advocates a middle of the road policy that would give religious institutions some limited priorities.

The existence of this diversity of outlook as to whether religious institutions are to be accorded a privileged status under zoning ordinances, and if so the extent thereof leads to the conclusion that the position that each state

takes in this field has its foundation principle in the public policy of that state. New York's public policy was enunciated by Judge Frossel in *Matter of Diocese of Rochester* v. *Planning Board, supra,* when he said at p. 522:

> "Thus, church and school and accessory uses, are, in themselves, clearly in furtherance of the public morals and general welfare. The church is the teacher and guardian of morals (State ex rel Synod of Ohio v. Joseph, 139 Ohio St. 229, supra), and 'an educational institution, whose curriculum complies with the state law, is considered an aid to the general welfare' (Archbishop of Oregon v. Baker, 140 Ore. 600, 613 supra)."

and by Chief Judge Conway in *Matter of Community Synagogue* v. *Bates, supra,* at p. 458 with the following words:

> "The position of the Village, as stated clearly in its brief (pp. 12-14), is that the board of appeals, under the provisions of the ordinance here, should have the power to deny an application for the location of a church at a 'precise spot'. This would not, of course, prohibit the use, erection, alteration, or improvement of buildings or structures for churches and synagogues, in municipalities such as the intervenor, but would limit it. While many may be tempted to think that the solution offered by the intervenor is excellent, when one thinks it through one realizes that, if the municipality has the unfettered power to say that the 'precise spot' selected is not the right one, the municipality has the power to say eventually which is the proper 'precise spot'. That, we all can see is the wrong solution. The men and women who left Scrooby for Leydon and eventually came to Plymouth in order to worship God where they wished in their own way must have thought they had terminated

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> the interference of public authorities with free and unhandicapped exercise of religion. We think that we should accept the fact that we are the successors of 'We the people' of the Preamble to the United States Constitution and that a court may not permit a municipal ordinance to be so construed that it would appear in any manner to interfere with the 'free exercise and enjoyment of religious profession and worship'. (N.Y. Const., art. I, § 3).

Certainly, the desire to accord to religious institutions the constitutional guarantee of free exercise of religion influences a states public policy, but New York's concern on this point does not have its genesis solely in the First Amendment of the United States Constitution because Article 1, Section 3 of the New York State Constitution provides:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall be forever allowed in this state to all mankind; . . . ."

New York chooses to emphasize the inspirational values of religious institutions by recognizing that by their very nature they are in furtherance of the public health, safety and general welfare and so are entitled to a privileged status. Other states, while acknowledging these factors, may determine that they do not outweigh the desire to preserve the purely residential character of neighborhoods and elect not to defer to them. So long as neither view serves to abridge religious freedom, it would seem there is no substantial federal question presented when a state decides to follow either course of conduct.

CONCLUSION

The petition for a writ of certiorari should be denied for lack of a substantial federal question.

Dated: Great Neck, N. Y., May 24, 1976.

Respectfully submitted,

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